IN THE

Supreme Court of the United States

October Term, 1961

No. 236

HARRY LANZA,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

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Jurisdiction

There is serious question whether this Court has jurisdiction to grant certiorari in the instant case. The petitioner stands convicted, pursuant to the modification of the judgment by the New York Court of Appeals, of a single

crime: *viz.*, contemptuous refusal to answer a number of questions before a Joint Legislative Committee. The petitioner challenges these questions as having stemmed from what he deems to be an unconstitutional investigative procedure. Assuming, without conceding, the validity of his claim, the judgment below would be unaffected since it rests as well on questions clearly outside the challenged source.

Pertinent Provision of the United States Constitution

U. S. Constitution, Amendment 14 §1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Statutes

Section 1330 of the Penal Law, upon which the indictment is based, reads as follows:

> **"§1330. Refusing to testify**
>
> "A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor."

The immunity provisions in the Penal Law, pursuant to which the defendant was summoned to appear as a witness, was offered immunity and was ordered to testify, are the following:

"**§381. Offender a competent witness; witnesses' immunity.**

"1. A person who has violated any section of this chapter relating to bribery or any section of this article [Art. 34] or who has committed an attempt to violate any such section is a competent witness against another person so offending.

"2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"**§584. Witnesses' immunity**

"In any criminal proceeding before any court, magistrate, or grand jury, or upon any investigation before any joint legislative committee for or relating to a violation of any of the provisions of this article [dealing with conspiracy], the court, magistrate or grand jury, or the committee, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§2447. Witnesses' immunity.

"1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

"2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

"3. 'Competent authority' as used in this section means:

• • •

"(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to

the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein;

* * *

"Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

"4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

"5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

Questions Presented

Does this Court have jurisdiction to grant a writ of certiorari where the petitioner's claims, even if assumed to be correct, would not affect the judgment below?

Will this Court inquire into the basis of a legislative committee's questions where adequate immunity is granted and testimony compelled?

Is eavesdropping in a prison violative of due process or the search and seizure sanctions of the United States Constitution?

Statement of the Case

On June 19, 1957, the petitioner was called before the Joint Legislative Committee on Government Operations of the Legislature of the State of New York (149),* a duly constituted state body, to be questioned concerning any knowledge that he might have pertinent to corruption in the New York State Parole Commission (267-269). The committee, after granting the petitioner immunity from prosecution (348-59), directed that he reply to a number of questions (359-402). The committee counsel formulated a majority of his questions based on information independently gathered by another state agency (467-514, 518-19). Officials at the Westchester County Jail had supplied the committee with transcripts of conversations which were obtained by use of an electronic recording device which was installed in a prison visitors' room (467-514). The petitioner was a party to some of the overheard conversations (467-514).

For failing to answer the questions pursuant to direction, the petitioner was indicted on nineteen separate counts of refusing to testify (N. Y. Penal Law §1330). Each count in the indictment was based upon a single question which the petitioner refused to answer before the committee. The trial court found the defendant guilty on each of the nineteen separate counts (789) and sentenced him to ten consecutive terms of one year each (801-820).

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* References are to the folios of the N. Y. Court of Appeals record unless otherwise indicated.

The New York Supreme Court, Appellate Division, First Department, modified the judgment by directing that the terms imposed be served concurrently, and left open the question of the number of crimes committed (874-892) (petition pp. 17-23) [10 App. Div. 2d 315 (1st Dept. 1960)].

The New York Court of Appeals modified the judgment further, holding that a single crime had been committed, but that the sentence need not be altered (petition pp. 15-16).

The Appellate Division held in part [10 App. Div. 2d 315 (1st Dept. 1960)]:

> "It may well be that the refusals to testify here involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People* v. *Faden*, 271 N. Y. 435, 444-445.)."

The Court of Appeals noted [petition p. 15]:

> "The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People* v. *Riela*, 7 N. Y. 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed."

POINT I

Even assuming the validity of the petitioner's argument, no constitutional question is presented.

The petitioner contends that he has been deprived of liberty without due process in that the questions which ultimately led to his conviction were based on "illegally" or "immorally" obtained information (petition, pp. 7-14).

The petitioner's argument scrupulously avoids the obvious distinction between those questions or indictment counts which were based upon the alleged "illegal" evidence and those which were not. This avoidance obfuscates the issue of jurisdiction and attempts to create a foundation for a writ where none actually exists. This distinction is actually crucial. Even if we assume that every count based upon the alleged "illegally" or "immorally" obtained information were invalid [Counts 2-18 (483-504)], the judgment would stand, for the evidence in the record conclusively establishes that Counts numbered One and Nineteen are in no way connected with the allegedly contaminated information. This is clearly revealed by the record of the petitioner's trial below, where his trial attorney cross-examined the committee counsel concerning the basis of his questions propounded to the petitioner at the committee hearing (475-481):

> "Q. Now, after examining the 19 counts contained in the indictment here, can you tell me whether the data or material on which were propounded your questions were the result of information you gave or gathered from those interceptions? A. I think some of

the questions were based upon the recordings of conversations between Joseph and Harry Lanza, and other or others of them as I hastily thumbed through the indictment were not.

"Q. Can you show me one of the 19 questions which were not the result of the tapes which you had available to you? A. The first one that occurs to me and this I do not mean to infer is the only one but you asked me to show you one example, the first one I would like to refer to is the count numbered 18th [*sic.* Actually, 19th] or the last count of this indictment.

• • •

"Q. Would you read the question, Mr. Bauman, please? A. In the last count of the indictment, so there is no confusion of what I am referring to, which is numbered 18th, [*sic.* Actually, 19th] the question is specified as follows: 'Mr. Lanza, please tell the Committee the name of anyone with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza.'

"Q. You can tell me now, Mr. Bauman, that you didn't ask that question as a result of the information that was made available to you from those tapes? A. I can.

"Q. You can say that without fear of successful contradiction, is that correct? A. Yes, I think so.

"Q. Show me one other question, Mr. Bauman? A. Well, I will start with number One.

"Q. Will you do that please? A. Yes (looking through indictment). In the first count, Mr. Direnzo?

"Q. Yes. A. The question is quoted as follows: 'On February 5th, 1957 your brother Joseph Lanza

was arrested and returned to prison charged with a violation of parole. Tell the Committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole? Q. You say that you did not gather any material from the tapes upon which to predicate that question, Mr. Bauman? A. I have said and I say Mr. Direnzo, that that question as well as the previous one was not based upon any material in the tapes.'

"Q. You are sure about that? A. Yes."

Counts 1 and 19, which are clearly outside the petitioner's complaint, sustain the judgment as it presently stands. It has long been the law in New York that a judgment on multiple counts is supportable by any valid count thereunder, irrespective of other defective counts.

In the year 1874, the Court of Appeals, in *People* v. *Davis*, 56 N. Y. 95, directed these words to this issue:

"The motion in arrest of judgment was properly denied. This was based upon an alleged defect in the third count. But the verdict was general, finding the accused guilty upon all the counts. The indictment contains two counts confessedly good. It is sufficient if it contains one good count. This will sustain the conviction, irrespective of other defective counts."

In 1881 the high Court passed on the issue in *Hope* v. *People*, 83 N. Y. 418, in like manner.

"The sufficiency of these counts is claimed by the prosecution to be established by the case of *Brooks* v. *People* (49 N. Y. 436), but we do not think it material now to examine the question. In all the counts the robbery is alleged to have been committed upon

Werckle. The first and second counts, which lay the property in him, are conceded to be good. Even if the others were bad, that would be no ground for directing an acquittal of the prisoner on the whole indictment, and an acquittal specially on the third and fourth counts would be of no importance, so long as he was convicted upon the good counts, the robbery being the same, the only difference between the counts being in the allegation of ownership.

• • •

"Nor is the conviction rendered erroneous, the verdict being general, merely by reason of there being bad counts in the indictment, provided some of the counts are good. Whether the prisoner is found guilty or acquitted on the bad counts in such a case is matter of no importance; though the bad counts describe no offense, his conviction upon the good counts is not impaired, and he would be in no better condition if the court had on the trial withdrawn the bad counts from the consideration of the jury."

Again in 1913, the Court stated the law on this issue [*People* v. *Cummins*, 209 N. Y. 283 at page 296]:

"Finally, on this point, it is settled law that a conviction under a general verdict is not rendered erroneous by the presence of bad counts in an indictment provided some of the counts are good. (*Hope* v. *People*, 83 N. Y. 418)."

The most recent consideration of this issue by the Court of Appeals was in *People* v. *Faden*, 271 N. Y. 435, in 1936, when the rule was again affirmed. The Court, citing *Cummins* and *Davis*, observed the following:

> "We need not take up the second count in the first information, which charged the violation of both sections 340 and 357 in separate counts, by doing business with, and making usurious loans to, the same person, because the conviction on the first count would be sufficient to sustain the judgment even if the second count were bad. (*People* v. *Cummins*, 209 N. Y. 283, 296; *People* v. *Davis*, 56 N. Y. 95, 100.)"

It is therefore clear that success in this Court on his constitutional claim could in no way affect the judgment below. *A fortiori*, he suffered no infringement of his constitutional rights by virtue of his conviction of Counts Two through Eighteen. Absent a convincing showing of actual impairment of a constitutional right, the question presently raised by the instant petition is exposed as a mere hypothetical, imaginary, and unreal issue. It is well settled by an unbroken line of authority that this Court will not assume jurisdiction by the issuance of a writ of certiorari under such circumstances [see, *e.g.*, *Cincinnati* v. *Vesper*, 281 U. S. 349 (1930); *Zucht* v. *King*, 260 U. S. 174 (1923); *Seaboard Airline Ry. Co.* v. *Watson*, 287 U. S. 86 (1932)].

Moreover, even assuming the jurisdiction of the Court, under expressed policy and pursuant to the reasoning above set forth, the constitutional point raised would not be reached under the circumstances of the instant petition owing to the presence of a simpler means of disposing of the case, *i.e.*, affirmance of the judgment on the unchallenged counts [see *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 419 (1837); *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115 (1955)].

POINT II

The Court of Appeals' resolution of the petitioner's claim was in conformity with the decisions of this Court.

The situation here involves a duly constituted legislative committee, representing both the Senate and Assembly of the New York Legislature, calling before it the petitioner who may have had information pertinent to one of the committee's lawful objectives. The petitioner appeared with legal counsel and declined to answer a series of questions on the grounds that the answers might tend to incriminate him [N. Y. Const., Art. I §6]. After the petitioner's refusal, he was guaranteed "full immunity" (358-9) from future prosecution for crimes exposed by his disclosures and then directed to answer (348-357). There is no claim here that the granted immunity pursuant to Sections 2447, 381, and 584 of the New York Penal Law was inadequate.

It is no longer debatable that immunity legislation, broad enough in scope to be equivalent to a constitutional privilege, may be substituted for that privilege. *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892); *Brown* v. *Walker*, 161 U. S. 591 (1896).

Regan v. *New York*, 349 U. S. 58 (1954) held that the sole constitutional requirement in a testimonial compulsion case is that adequate immunity be granted. Indeed the instant case is more persuasive than *Regan* for here there is no issue of waiver, no possible subsequent prosecution. In light of the fact that petitioner would have been free

of future prosecution if he had testified, it is difficult to follow the petitioner's argument that immunity here is not dispositive of his claim of violation of due process.

What purpose is served or right preserved by the petitioner's contumacious conduct since he can be deprived of no right to due process of law? Whatever embarrassment to the petitioner might have been occasioned by compelling his testimony is clearly justified. Society, through its varied agencies, has the right and duty to investigate crime and corruption and to protect the community at large. Balancing of the rights of individual citizens and the rights of the community is indeed one purpose of immunity legislation. The petitioner's refusal to answer as directed thus frustrated the rightful powers of the Joint Committee. His purpose may be reasonably inferred from trial counsel's observation on sentencing (798-799) and petitioner's own exhibit (647-651, 850-851). It is clear that the petitioner attempted to protect his brother and others who were engaged in a scheme to corrupt a public official. This, of course, is not a legitimate invocation of a constitutional privilege, immunity not considered.

The petitioner attempts to avoid the conclusion of *Regan* by attacking the basis of the committee's question. Of course we need only discuss questions 2 through 18 in that as indicated in Point I the petitioner does not complain of the basis of questions 1 and 19.

The intrusion of a court into the internal information gathering procedures of a committee is inconsistent with the separation of powers concept. The limitation of the

judicial power in affecting the functions of a legislative committee is long established. *McGrain* v. *Dougherty*, 273 U. S. 135 (1927).

Of great significance on this issue is the court's observation in *Hearst* v. *Black*, 87 F. 2d 68 (D. C. Cir. 1936):

> "The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others."

The court in *Barsky* v. *United States*, 167 F. 2d 241 (D. C. Cir. 1948), stated that the remedy for legislative misconduct by committee is with the parent body or with the people:

> "The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.'"

Of course, there may be extreme circumstances when judicial inquiry into legislative procedures would be justi-

fied to protect an individual's constitutional rights. But that situation clearly does not exist here. Not only did the committee provide the petitioner with an adequate immunity from future prosecution, but it did not participate in the challenged eavesdropping. Moreover, the petitioner herein was not the target of the investigation.

In this connection, it may be of tangential interest that the prime subject of the eavesdropping—the brother of the petitioner—unsuccesfully applied to this Court for certiorari to review the identical matter here in issue. [*Lanza* v. *New York State Joint Legislative Committee*, 355 U. S. 856 (1957)]. Moreover, in that case the petitioner stood on firmer ground than does his brother herein for there it was claimed that the authorities eavesdropped on a conversation between an attorney and his client. The alleged interference with a privileged conference is, of course, a factor not present in the instant petition.

The petitioner, while avoiding the controlling issues of the case, intertwines two constitutional themes.

First, he alleges that he has been deprived of due process relying solely on *Rochin* v. *California*, 342 U. S. 165 (1952), and *Leyra* v. *Denno*, 347 U. S. 556 (1954), which he maintains are indistinguishable from the case before the Court (petition pp. 11-12).

Rochin, which involved the violent physical invasion of the defendant's person to extract morphine tablets from his stomach, and *Leyra*, which involved a coerced confession from a "physically and mentally exhausted subject" obtained by a highly skilled psychiatrist, are, as the Appellate

Division below observed, clearly not in point [10 App. Div. 2d 315 (1st Dept. 1960)]. Some of the distinctions which immediately occur to mind are, first, there is no coercion, violence or brutality involved in this case—the issue is eavesdropping, not coerced confession; second, the evidence acquired, or anything tainted by it, was never introduced in a prosecution against the petitioner; third, the petitioner was convicted of an entirely different crime than the one indicated by the overheard information; and finally, the petitioner was given immunity from prosecution.

Second, interspersed in the Fourteenth Amendment argument are references to an illegal search (petition pp. 12-13). On this issue, it is difficult to understand the petitioner's position. While initially he concedes that the eavesdropping was "not illegal or criminal," (petition p. 9), he later claims that the information was "illegally acquired" (petition p. 13). Both positions are set forth with force but unfortunately without supporting authority or reason.

As petitioner initially admits, at the time the eavesdropping occurred in this case (February 1957) it was not illegal or criminal. Electronic eavesdropping was an area where technological progress had outdistanced the law. This situation was promptly and adequately rectified in New York State by legislation effective in July, 1957. Sections 738 through 745 of the New York Penal Law put eavesdropping on a footing with wiretapping. Eavesdropping may be accomplished today only by specified law enforcement officials upon a court order or where specially justified by the exigencies of the situation (see also §§813a, 813b N. Y. Code of Crim. Proc.).

Since the eavesdropping here was legal under New York law, we need only consider whether it be a violation of the Fourth or Fourteenth Amendments.

Eavesdropping without physical intrusion into an area protected by the Fourth Amendment is not a violation of the constitutional rights of an individual [*Silverman* v. *United States*, 81 S. Ct. 679 (1961)]. *Silverman*, it will be recalled, is the case where "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioner." The penetration was accomplished with a spike microphone driven into the wall of a house making contact with the house's heating apparatus which served as a conductor for sound and enabled the government agents to overhear conversations taking place throughout the house. *Silverman* is not analogous here, where the record indicates (based on hearsay evidence) that the eavesdropping occurred in a State prison where one of the participants was a prisoner (465-474) who was subject to the constant supervision and observation of his jailors. No home was violated here; the eavesdropping occurred in a government building where the eavesdroppers were rightfully and lawfully present. It is clear that such conditions do not meet the *Silverman* intrusion into a protected area test.

Although the record is not clear as to where the microphone was placed in the instant case, *Goldman* v. *United States*, 316 U. S. 129 (1941), would seem determinative of the issues presented. In *Goldman*, the federal agents placed a detectaphone against the wall in a room adjacent to the

one in which the conversation took place. This Court admitted the eavesdropped information recognizing that the federal agents were lawfully present and had not intruded into an area protected by the Fourth Amendment.

Even if this case were controlled by *Silverman* rather than *Goldman*, the petitioner's extreme position would still fail to overcome *Hearst* v. *Black*, 87 F. 2d 68 (D. C. Cir. 1936), where illegally obtained evidence used by a committee was not disapproved.

The petitioner's reliance on *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which binds the states to apply the federal evidentiary exclusion rule in illegal search and seizure cases, is utterly misplaced. The eavesdropped information here was first, legally obtained, and second, never introduced in evidence against the petitioner.

Finally, a concluding remark is demanded by the petitioner's chronicle of critical comment (petition pp. 7-9) and his extravagant expressions of horror (petition pp. 6-7). Since the adverse criticism cited by the petitioner was directed at alleged interference with the attorney-client relationship—a different issue than that involved here—and since the prophecies of doom are maintained in spite of already existing remedial legislation, these harangues may justly be characterized as sound and fury signifying nothing.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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